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ONE YEAR REVIEW OF CORPORATIONS, PARTNERSHIP AND AGENCY

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Probably slightly more than the usual number of cases involving questions of corporation, partnership or agency law were decided in 1959. None of the cases can be considered, however, to be of crucial importance in the development of Colorado law in these areas. In one case presenting particularly acute problems of proper analysis and the application of established legal concepts, the Supreme Court was very sharply divided, so that generalization as to the value of the case as a precedent is difficult.

A. CORPORATIONS

1) Authority of Officers of Closely Held Corporations

One of the first cases decided by the Colorado Supreme Court held that the president of a corporation had authority to convene the board of directors to present for its consideration a demand by a corporate creditor.[1] The court thereafter rarely addressed itself specifically to authority of corporate officers until 1959, when three cases raising issues as to the authority of a corporate president were decided, all in favor of existence of the authority questioned, including authority to discharge a corporate debt, to borrow on corporate credit and to execute a contract on behalf of the corporation. The decisions have a double-edged significance: attorneys having misgivings regarding actions taken by the principal officer of their closely held corporate clients without strict observance of customary formalities may find comfort in the extent to which the court has upheld relatively loose, informal methods of corporate action; in other contexts, however, the extent to which the principal officer apparently is authorized to bind his corporation may give cause for alarm.

Colorado Federal Savings and Loan Ass'n v. Beery[2] involved a Colorado fire insurance company of which Schwab was president, treasurer and chief executive officer. His wife was vice president and secretary, and she and her husband were the company's sole directors and stockholders. Schwab deposited $10,000 of the company's funds with the Association, receiving a transferable, non-negotiable certificate of indebtedness stating that the company was a member of the Association and owner of a $10,000 investment-share account therein subject to its charter and by-laws. The Association's signature card executed at the time of the deposit did not bear the signature of the company but merely that of "Larry Schwab." Subsequently Schwab appeared at the Association's office, surrendered the certificate, indorsing it "Larry Schwab, Pr.," and received the Association's check in the amount of the deposit, payable to Schwab personally. Under the Association's rules, the certificate could be surrendered for cash by the owner or holder

1 Union Gold Mining Co. v. Rocky Mountain Nat'l Bank, 1 Colo. 531 (1872).
2 347 P.2d 146 (Colo. 1959).

upon indorsement corresponding with the signature card. It was assumed at trial that Schwab converted the proceeds to his own use. A receiver subsequently appointed for the company sued the Association to recover the amount of the deposit and recovered judgment in the trial court.

The Supreme Court reversed with directions to dismiss the complaint. The majority opinion by Mr. Justice Doyle stated: "Even though there was no formal resolution of the Board of Directors, in view of Schwab's ownership and control of the stock and his control of all of the offices, it would seem he had actual authority to surrender the certificate and receive the money."[3] Further, "Schwab also had apparent authority to receive payment. He had created the account, had signed the signature card in blank and he had possession of and surrendered the indicium of ownership."[4]

Justices Hall and Frantz dissented as to the effect of and inferences to be drawn from the evidence, being unable to agree that all of the facts upon which the majority opinion was predicated appeared in the record.[5]

In *Rock Wool Insulating Co. v. Huston*[6] the defendant corporation, of which Reilly was president and general manager, was essentially "a one man operation" and operated in a "loose, informal and unbusinesslike way."[7] The plaintiff loaned $5,000 to the corporation at the request of Reilly and other officers who represented that the money was to be used to pay corporate expenses, receiving in exchange a promissory note in the amount of $6,000 evidencing not only the $5,000 loan but also a prior $1,000 personal loan to Reilly. The note was executed by Reilly as president of the corporation and also individually. Proceeds of the loan were deposited in Reilly's personal bank account, and Reilly by his personal checks paid expenses of the corporation in an amount exceeding $5,000. Testimony was conflicting as to whether the transaction was reported to the board of directors, which usually had approved Reilly's prior transactions, including numerous borrowings. The corporation's secretary-treasurer was familiar with the subject transaction, but the corporate books did not reflect it. The books did show, however, a $5,000 indebtedness to Reilly. In this action on the note, the corporation contended the transaction was a personal loan. In affirming judgment for the plaintiff, the Supreme Court stated that there was evidence in the record to support the plaintiff's claim and refused to hold as a matter of law that the loan was a personal one.

Film Enterprises, Inc. v. Selected Pictures, Inc.[8] raised questions not only as to authority of officers but also as to validity of intercorporate contracts involving common controlling persons. Selected had three directors, who were also its sole stockholders. One of them, Bailey, was its president and chief managing officer. Under Bailey's supervision, Selected's office manager customarily

3 *Id.* at 149.
4 *Id.* at 150.
5 The dissenters questioned whether authority to make deposits implied authority to make withdrawals; whether Schwab and his wife in fact were the only shareholders; whether Schwab and his wife in fact were the only directors; whether Schwab was the only person actively managing the corporation; and generally attacked inferences by the majority as to Schwab's authority.
6 346 P.2d 576 (Colo. 1959).
7 *Id.* at 578.
8 335 P.2d 260 (Colo. 1959).

executed all corporate checks and contracts, having express authority from Bailey to do so. Bailey was also authorized to execute contracts on behalf of Selected. The other two directors, in effect, were silent partners with whom Bailey did not want to be publicly associated.

Film was a corporation organized by George, using $3,000 advanced for that purpose by Bailey, in order to distribute a motion picture film. It was understood that Bailey was to receive a fifty per cent stock interest in Film upon the occurrence of certain contingencies. Only three qualifying shares were ever issued in Film.

Selected contracted to rent the motion picture from Film, Bailey and another director of Selected having previously seen the picture exhibited. The contract was executed by George on behalf of Film and on behalf of Selected by Bailey, who signed the name of the office manager thereto without disclosing to him either the terms of the contract or its execution. The other two directors of Selected also were unaware of execution of the contract, and Selected's files contained no record thereof. Selected did, however, distribute the film and retained the proceeds without remitting rentals to Film.

In a suit by Film to enforce the contract, the Supreme Court reversed a judgment for Selected in the trial court, holding that, under the circumstances, Bailey had implied power to execute the contract in the name of Selected, using the office manager's name even without his knowledge; that so doing did not constitute a forgery; and that Bailey had no duty to report execution of the contract to the other directors.

2) Intercorporate Contracts Involving Common or Interested Controlling Persons

The trial court in the *Selected Pictures* case concluded that, in view of Bailey's financial interest in Film and his non-disclosure of his actions, conduct and interest to the other Selected directors, his actions could not be sustained in a suit to enforce the contract. On appeal it was urged that the contract was "void" because Bailey was a dominant member of both corporations, so that an arm's-length transaction was impossible. The court did not agree that the contract was void, but stated: "This is the type of situation which calls for a close judicial scrutiny to determine the absence or presence of fraud and unfairness and could result in a voidable contract."[9] The court noted that no adequate evidence appeared in the record showing the contract to be either fair or unfair and disposed of the contention as follows: "In law the deliberate withholding by Selected of payments acknowledged to be due Film resulted in an adequate ratification of this contract to bind Selected regardless of the fairness or unfairness of the contract and of Bailey's controversial role in its execution."[10]

This aspect of the case, therefore, adopts the rule that a dual position of corporate directors and officers in intercorporate con-

9 *Id.* at 264.
10 *Id.* at 265.

tracts does not alone make such contracts void,[11] but that such contracts, even if unfair and thereby voidable, are nonetheless subject to ratification. The more difficult question, whether existence of an interest adverse to the corporation is so material a fact that its nondisclosure should make the contract voidable, even if fair in its terms, remains to be decided.[12]

3) Failure to File Annual Report

Prior to effectiveness (January 1, 1959) of the Colorado Corporation Act of 1958,[13] executive officers and directors of a corporation failing to file the prescribed annual report were subject to joint and several liability for the portion of the corporation's debts contracted in the calendar year preceding the due date of the report, except that liability could not be imposed on an individual officer or director in excess of $1,000 nor "for any debt contracted while he was not a director."[14] The provision was amended in 1955 to prohibit suits thereunder "after" the date of filing of a delinquent report for the year in which the debt sued on was contracted.[15] No corresponding liability provisions appear in the 1958 legislation[16] or the 1959 amendments thereto.[17]

The liability of directors under the pre-1958 provisions summarized above was the subject of two cases decided in 1959. *Carpenter Paper Co. v. Noble*[18] established that resignation of a director at any time during the calendar year preceding default in the filing of the report relieved such director from the statutory liability and that, on the other hand, the filing of a bankruptcy petition by the corporation prior to the default did not relieve a director still in office from the liability. The defendants in *Nichols v. Garrott*[19] relied on the 1955 amendment, which was enacted three days after the default complained of, and on their having filed a delinquent report on the same day on which the action against them was commenced. The Supreme Court affirmed judgment for the plaintiff.

4) Access of Foreign Corporations to Colorado Courts

In *Aero Spray, Inc. v. Ace Flying Service, Inc.*,[20] foreign corporation *A*, alleging a claim against foreign corporation *B* for goods sold and delivered in Oregon, proceeded in attachment and garnishment against a debt owing *B* from the State of Colorado. Neither *A* nor *B* had qualified to do business as a foreign corporation in Colorado. *B* was served by publication. The Supreme Court, reversing dismissal of the complaint, held that *A* could maintain the attachment proceeding. Unfortunately the opinion does not make clear, however, whether or not *A* in fact had engaged in business in Colorado prior to the suit. If so, *A* presumably would have lacked

11 Accord, Everett v. Phillips, 288 N.Y. 227, 43 N.E.2d 18 (1942). The decision appears in large measure to overrule *sub silentio* the doctrines of Morgan v. King, 27 Colo. 539, 79 Pac. 416 (1900) (sale of mining stock, though free from fraud, by corporation to its directors set aside where five of eleven directors were interested) and Paxton v. Herron, 41 Colo. 147, 92 Pac. 15 (1907) (interested director cannot be counted for quorum).

12 See Ballantine, Corporations 178 (Rev. ed. 1946).

13 Colo. Sess. Laws 1958, ch. 32.

14 Colo. Sess. Laws 1931, at 260-61.

15 Colo. Sess. Laws 1955, at 236.

16 Colo. Sess. Laws 1958, ch. 32.

17 Colo. Sess. Laws 1959, ch. 83.

18 345 P.2d 731 (Colo. 1959).

19 338 P.2d 683 (Colo. 1959).

20 338 P.2d 275 (Colo. 1959).

standing to sue on account of its non-qualification.[21]

B. PARTNERSHIP

None of the 1959 Colorado cases arose under either the Colorado Uniform Partnership Law[22] or the Colorado Uniform Limited Partnership Law.[23] In *Hutchinson v. Elder*,[24] a series of contracts contemplating development of building sites was interpreted as having created a joint venture, but the case is not otherwise remarkable from the standpoint of the law of partnerships and joint ventures.

C. AGENCY

1) Existence and Duration of Principal-Agent Relation

Cox v. Metropolitan State Bank, Inc.[25] is placed under this heading with misgivings. The case is remarkable not so much for the law established thereby or its value as a precedent, as for the fact situation presented, which can be, and was, analyzed in terms of a number of customary legal concepts and categories, including those of principal-agent, trustee-beneficiary, creditor-debtor, of the law of sales and the law merchant. Judging from the experience of the Supreme Court justices in dealing with the case, it should provide raw material *par excellence* for bar examiners and law professors. The facts were as follows:

Rust was a dealer in grain and motor vehicles, sometimes acting as agent of the owner in selling vehicles, sometimes buying for resale as principal and sometimes acting on a commission basis. He had conducted his banking business at the defendant bank for several years, which was generally familiar with his operations. He owed the bank approximately $8,000, long past due, which the bank had been attempting without success to collect.

Rust agreed to attempt to sell a truck belonging to Cox with the understanding that Rust could retain the excess of the sales price over $5,000. Rust thereafter attempted unsuccessfully to sell the truck to several prospective purchasers under arrangements which were attempted to be financed through the bank. On December 15, 1954, Rust did, however, obtain a purchaser at a price of $6,120.

21 Colo. Sess. Laws 1959, ch. 83, § 119 [1], at 341 provides: "No foreign corporation transacting business in this state without a certificate of authority nor anyone in its behalf shall be permitted to maintain any action, suit or proceeding in any court of this state, until such corporation shall have obtained a certificate of authority."

22 Colo. Rev. Stat. ch. 104, art. 1 (1953).

23 Colo. Rev. Stat. ch. 104, art. 2 (1953).

24 344 P.2d 1090 (Colo. 1959).

25 138 Colo. 576, 336 P.2d 742 (1959).

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On December 18, at the request of Cox, Rust issued his personal check for $1,000 to Cox on account of his interest in the sales price. On December 20 Rust received a $6,120 uncertified check from the purchaser drawn on a bank in Utah. On the same day Cox delivered to Rust an assignment of title to the truck executed in blank, and Rust issued to Cox additional checks drawn on the bank in amounts of $3,500 and $500. Rust later inserted his name as assignee of title to the truck but testified, apparently without contradiction, that the title certificate would have been handled the same way whether Rust acted as principal or on a commission basis.

Rust consulted officials of the bank in a private office for ten to thirty minutes prior to depositing the $6,120 check to his general account at the bank on December 20. The bank's ledger card concerning Rust's indebtedness was on the table throughout the consultation. At least one purpose of the consultation was to expedite clearance of the $6,120 check; the balance in Rust's account was insufficient to pay all the Cox checks without credit for the $6,120 deposit. The bank advised Rust to secure a telegram from the Utah bank accepting the $6,120 charge, which was done; and Rust's account was credited with the deposit on the same day. The deposit slip stated all deposits were accepted for collection only; that credit was given only conditionally; and that the bank reserved the right to charge back to the depositor all unpaid items. The bank did, however, on December 20, cash the $500 check given to Cox, for which sufficient funds were on deposit in Rust's account prior to deposit of the $6,120 check.

Rust testified that, during the foregoing consultation, he also had informed the bank concerning the Cox transaction and that the bank had promised, prior to the $6,120 deposit, not to seize the deposited funds for application to Rust's indebtedness to the bank. The bank officials, however, denied knowledge of the Cox transaction and the making of such a promise.

Also on December 20, the bank's prior efforts to collect its debt owing from Rust resulted, late in the day, in his delivering to the bank, in satisfaction of the debt, a deed to certain real estate warranting title to be free and clear except for first deed of trust of which the bank admitted knowledge.[26] In fact a second deed of trust was of record at the time the deed was executed, which was not discovered by the bank until December 21.[27] The bank immediately rescinded its release of Rust from his debt and seized the entire balance on deposit in his account. The remaining checks, totalling $4,500, subsequently were dishonored.

Cox then sued the bank and Rust for $4,500, claiming that the $6,120 deposit was a special one as the bank knew or had reason to know. The trial court entered judgment for Cox on the ground that a valid accord and satisfaction had occurred with respect to Rust's debt to the bank and that the bank could not rescind

26 There is perhaps some confusion as to the exact time of delivery of the deed. In the first appeal, Metropolitan State Bank v. Cox, 134 Colo. 260, 302 P.2d 188 (1956), the opinion states that the deed was delivered to the bank "before the sale of the tractor by Rust and the receipt by him of $6,120 from the purchaser . . ." (*Id.* at 263, 302 P.2d at 190.) In the same opinion, the Court quotes a trial court finding that Rust " 'delivered the deed to Mr. Fash, an agent of the bank, at his home about midnight December 20, 1954.' " (*Id.* at 266, 302 P.2d at 191.)

27 The bank's lack of knowledge of the second deed of trust was not found by the trial court at the time of the first appeal (see note 26 *supra*).

its release, cancel the deed and revest title in Rust except through appropriate legal proceedings. The Supreme Court reversed, holding the bank had the right, assuming its acceptance of the deed had been induced fraudulently, to treat its discharge of Rust's debt as a nullity, and remanded for further findings on the question of fraud.[28] Upon the remand, the trial court gave judgment for the bank. On appeal from that judgment, the Supreme Court in the instant case again reversed with directions to enter judgment for Cox.

The majority opinion, written by Mr. Justice Moore, states that the trial court finding that the $6,120 deposit was not received as a special deposit "is tantamount to a finding that the bank had no notice of the trust nature of the transaction between Rust and Cox";[29] and that the trial court's finding that the funds seized by the bank " 'were not trust funds' " was not supported by the evidence.[30] It then answered in the affirmative the following question:

> *Where an agent has money in his possession belonging to his principal, which he deposits in his own general bank account with the intention of paying the sum due his principal by check drawn on that account; and where at the time of the deposit the agent is indebted to the bank on a past due obligation, and the bank accepts the deposit with knowledge that the agent holds the money in trust for the benefit of his principal, and sets off the amount of the debt of the agent against the deposit; where at the time the bank applies the deposit on the debt of the agent it has not changed its position to its detriment in reliance upon said deposit; can the principal recover from the bank that portion of the deposit which the agent held in trust for his use and benefit?*[31]

The affirmative answer is based on the principle that misapplied trust funds can be traced and subjected to the use of the trust beneficiary unless acquired by a bona fide purchaser, and particular reliance is placed on a Minnesota case, *Agard v. People's Nat'l Bank*.[32] *Boettcher v. Colorado Nat'l Bank*[33] was overruled, and *Sherberg v. First Nat'l Bank*[34] was modified, to the extent inconsistent with the instant opinion.

Mr. Justice Sutton, concurring specially, disagreed that the bank should be held to have accepted the $6,120 deposit without knowledge of its special status, stating that "as a matter of law the bank knew this was trust money and specially deposited."[35]

Mr. Justice Frantz, also concurring specially, would have disposed of the case entirely on the basis of the language of the deposit slip used in connection with the $6,120 deposit, stating that the bank was acting as Rust's agent for collection of the $6,120 check; that the bank did not acquire title to the check by its endorsement thereon; that the legal relations between the bank and Rust could not be changed by the bank's unilateral act; and that all

28 Metropolitan State Bank v. Cox, 134 Colo. 260, 302 P.2d 188 (1956).
29 138 Colo. at 583, 336 P.2d at 746.
30 *Ibid.*
31 *Id.* at 583, 336 P.2d at 747.
32 169 Minn. 438, 211 N.W. 825 (1927).
33 15 Colo. 16, 24 Pac. 582 (1890).
34 122 Colo. 407, 222 P.2d 782 (1950).
35 138 Colo. at 588, 336 P.2d at 749.

questions in the case should be resolved "on the basis of Rust being the owner of the check."[36] Just how Mr. Justice Frantz reasons from this statement to his concurring result is not clear.

Mr. Justice Hall, joined by Mr. Justice Knauss, dissented, finding no support in the record to justify the majority's conclusion that $5,000 of the $6,120 was received by Rust as trustee for Cox. Rather, in the opinion of the dissenters, Rust acted as agent for Cox only until Cox transferred title to the truck to Rust in exchange for Rust's checks, at which time the purposes of the agency were accomplished and the relation between Rust and Cox became that of debtor and creditor, evidenced by the checks to Cox. The dissenting opinion particularly emphasizes that the record does not support any conclusion that Cox ever had any knowledge of the purchaser's identity, the purchaser's check, or that Cox had ever issued any instructions with respect to that check. The opinion concludes that there was nothing to indicate creation of an express trust or from which to imply a resulting trust, particularly in view of the fact that Cox, in bringing suit against Rust, introduced in evidence Rust's checks to Cox and did not claim any breach of duty by Rust as agent or trustee.

The majority opinion simply states flatly that the funds deposited were trust funds, ostensibly because they were funds held by an agent for the benefit of his principal. But that conclusion is reached without dealing squarely with the questions raised by the dissenters as to the scope of the agency and whether the agency had terminated prior to the deposit. This appears particularly unfortunate in view of reliance, to a substantial extent, by both the majority and the dissenters, on the same evidence of record in support of their respective positions.

2) Ratification

Hayutin v. Gibbons[37] raised the question of liability of alleged principals to a third person with whom the purported agent had contracted for the furnishing of materials. The trial court found on conflicting evidence that no agency had been created but that one of the defendants subsequently had promised to pay for the materials. The Supreme Court, affirming judgment against that defendant, held that the express promise to pay effected a ratification of the unauthorized act.

In *Jahn v. Park Hill Realty Co.*,[38] an action for a real estate broker's commission, the defense was that only one of two joint owners of the property had signed an extension of the broker's exclusive listing. During the extension period, in which the broker continued his efforts to sell the property with the knowledge and consent of both owners, the owners signed a contract of sale and accepted a deposit thereunder. The Supreme Court affirmed a trial court finding that the non-signing owner had ratified execution of the extension.

3) Workmen's Compensation Act[39] *"Employer"*

In *Snyder v. Industrial Accident Comm'n*,[40] Snyder agreed to install sidewalks in Denver. He was not licensed to do so under the

36 *Id.* at 593, 336 P.2d at 752.
37 338 P.2d 1032 (Colo. 1959).
38 347 P.2d 772 (Colo. 1959).
39 Colo. Rev. Stat. ch. 81 (1953).
40 138 Colo. 523, 335 P.2d 543 (1959).

applicable Denver ordinance, nor did he carry workmen's compensation insurance. In accordance with his prior practice, Snyder agreed with Dillie, who was licensed and who carried such insurance, to do the work jointly, each using his own employees, with profits to be divided equally. Pursuant to the ordinance, Dillie obtained a permit for the job and placed his stamp on the completed sidewalks as the contractor responsible for workmanship and materials. Lopez, one of Snyder's employees, was shifted from one job to another as required. While performing a task at Dillie's direction, Lopez injured his back. The district court, in an action in which Dillie was a respondent, sustained the Industrial Accident Commission's award of compensation to Lopez after dismissal of the proceedings as to Dillie and his insuror. On appeal, Snyder contended that Lopez was a statutory "employee" of Dillie.[41] The Supreme Court, reversing and remanding, held that the definition of "employee" was inapplicable but that both Snyder and Dillie were statutory "employers,"[42] since they were engaged as principals in a joint enterprise making them jointly responsible under the act.

4) One Spouse as Agent for the Other

In *Broomhall v. Edgemont Mining Co., Inc.*[43] a husband was held to have acted as agent for his wife in a series of transactions involving mining property in which he handled all their business, the wife testifying that she " 'left everything to Walter.' "[44] Among the questions raised was his authority to execute a general release. The Supreme Court held that the evidence supported the trial court's finding that the agency existed despite lack of express authorization from the wife.

5) Attorneys at Law

In 1959, Colorado cases included two disbarment cases,[45] neither of which is considered appropriate for comment here, and an attorney-suspension case of greater interest. In *Howard v. Hester*[46] the Supreme Court affirmed the established principle that "lawyers and real estate men stand in a confidential relation to their clients and principal, and extreme care must be exercised by them to see that their transactions bear the searching light of fair and aboveboard dealing,"[47] and approved the trial court's cancellation of a cognovit note executed by an incompetent 85-year-old woman in

41 Colo. Rev. Stat § 81-9-1 (1953) provides: "Any person, company or corporation operating or engaged in or conducting any business by leasing, or contracting out any part or all of the work thereof to any lessee, sublessee, contractor or subcontractor, irrespective of the number of employees engaged in such work, shall be construed to be and be an employer as defined in this chapter, and shall be liable as provided in this chapter to pay compensation for injury or death resulting therefrom to said lessees, sublessees, contractor and subcontractors and their employees, and such employer as in this section defined, before commencing said work, shall insure and keep insured his liability as herein provided and such lessee, sublessee, contractor or subcontractor as well as any employee of such lessee, sublessee, contractor or subcontractor, shall be deemed employees as defined in this chapter. Such employer shall be entitled to recover the cost of such insurance from said lessee, sublessee, contractor or subcontractor and may withhold and deduct the same from the contract price or any royalties or other money due, owing or to become due said lessee, sublessee, contractor or subcontractor. If said lessee, or sublessee, contractor or subcontractor doing any work as provided in this section shall himself be an employer as defined in this chapter in the doing of such work and shall before commencing said work insure and shall keep insured his liability for compensation as herein provided then such person, company or corporation operating, engaged in or conducting said business shall not be subject to the provisions of this section."

42 Colo. Rev. Stat. § 81-2-6(2) defines "employer" to include: "Every person, association of persons . . . who has four or more persons engaged in the same business or employment. . . ."

43 340 P.2d 869 (Colo. 1959).

44 *Id.* at 872.

45 People v. Sarvas, 342 P.2d 669 (Colo. 1959); People v. Buckles, 343 P.2d 1046 (Colo. 1959).

46 338 P.2d 106 (Colo. 1959).

47 *Id.* at 109.

favor of an attorney. In *People v. Howard*[48] the Supreme Court subsequently suspended the attorney involved while charges against him were pending before the court's Grievance Committee, taking judicial notice of its own records in the prior case.

Thompson v. McCormick[49] arose out of the uncomfortable situation of a plaintiff's attorneys who had been discharged by their client but were not permitted to withdraw from the case as attorneys of record. The attorneys first moved to withdraw on the ground of their inability to contact their client in order to prepare his case. It does not appear from the opinion, however, that the attorneys informed the court at that time of their having been discharged. The court subsequently set the case for trial, giving notice to the attorneys of record for the plaintiff. Prior to the date set for trial the attorneys again moved to withdraw, stating that they had been discharged. This motion was never ruled upon. The attorneys also advised plaintiff of the trial setting at his last known address, but plaintiff later testified he did not receive the letter. On the date set for trial, the court dismissed plaintiff's complaint with prejudice upon his failure to appear. The court later denied, after hearing, a motion by the plaintiff's successor attorneys to vacate the judgment of dismissal. The Supreme Court reversed and remanded with directions to vacate the judgment and to grant counsels' motion for withdrawal, stating: "Clearly plaintiff had the right to discharge his attorneys and, having done so, they were in no position to bind plaintiff in any manner; they had lost their former status as being his agent for service of certain notices and processes of the court."[50] In denying the motion to vacate, the trial judge had observed: " 'To sustain plaintiff's contention here would be to divest the Courts of any powers to bring their cases to final determination—for any litigant, by the means of discharging his attorneys, not engaging successors, and remaining away from the Courtroom could interminably stay all further proceedings, or if proceedings be had, as here, claim 'void' the judgment.' "[51] On balance, it would appear that a sounder rule would leave dismissal under such circumstances in the discretion of the trial judge rather than to assume, as a matter of law, that the unilateral act of a party litigant in discharging his attorney of record automatically operates to make a subsequent judgment subject to collateral attack for lack of notice.

48 342 P.2d 635 (Colo. 1959).
49 138 Colo. 434, 335 P.2d 265 (1959).
50 *Id.* at 440, 335 P.2d at 269.
51 *Id.* at 439, 335 P.2d at 268.

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